CIMB Bank Bhd v Teratai Sanjung (M) Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)-22–03 OF 2018
ABDUL RAHMAN SEBLI, ZALEHA YUSOF AND YAACOB MD SAM JJCA
5 SEPTEMBER 2019

Civil Procedure — Setting aside — Ex parte order — Appellant granted ex parte order for leave to enforce judgment made more than six years after order — Respondent sought order to set aside ex parte order — Whether High Court judge correct in affirming learned deputy registrar's decision to set aside ex parte order — Rules of Court 2012 O 46 r 2(1)(a)

This was an appeal against an exercise of discretion by the learned deputy registrar as affirmed by the learned High Court judge. Consent judgment was recorded in favour of the appellant bank against the respondents on 26 October 2009. On 6 June 2017 the appellant made ex parte application for leave to enforce the judgment. Leave to enforce judgment after six years was granted and the respondent sought an order to set aside the ex parte order. The ex parte order for leave to enforce the judgment after six years was ordered to be set aside by the deputy registrar of the High Court. The appellant appealed to the judge in chambers against the order of the deputy registrar setting aside the ex parte order and was dismissed, hence this appeal.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) None of the paragraphs of the affidavit in support of the appellant supported the argument that tenable reasons had been provided for the delay in enforcing the judgment. They merely set out the chronology of events, and nothing more than that. Since the appellant provided no reason at all to explain the failure to execute the judgment within six years, there was no basis for the learned deputy registrar to exercise his discretion in favour of granting leave pursuant to O 46 r 2(1)(a) of the Rules of Court 2012 (see paras 14–15).

(2) This was a situation where the appellant sat on its right to execute after the consent judgment was obtained. The whole idea behind O 46 r 2(1)(a) of the Rules of Court 2012 was for execution of the judgment to be fully completed within six years unless the party who had obtained judgment provides valid reason(s) for not doing so within that period. The decision in *RHB Bank Bhd v Raja Alawiah bt Raja Lop Idris* [2017] MLJU 1816 must be understood in the context of its own peculiar facts and circumstances, which were materially different from the facts and

circumstances of this case (see paras 16–17 & 22). A

[Bahasa Malaysia summary

Ini adalah rayuan terhadap pelaksanaan budi bicara oleh timbalan pendaftar yang bijaksana sebagaimana yang disahkan oleh hakim Mahkamah Tinggi yang bijaksana. Penghakiman persetujuan direkodkan terhadap perayu bank terhadap responden pada 26 Oktober 2009. Pada 6 Jun 2017 perayu membuat permohonan ex parte untuk kebenaran untuk menguatkuasakan penghakiman. Kebenaran untuk menguatkuasakan penghakiman selepas enam tahun telah diberikan dan responden memohon perintah untuk mengetepikan perintah ex parte. Perintah ex parte untuk kebenaran menguatkuasakan penghakiman selepas enam tahun diperintahkan untuk diketepikan oleh timbalan pendaftar Mahkamah Tinggi. Perayu merayu kepada hakim dalam kamar terhadap perintah timbalan pendaftar yang mengetepikan perintah ex parte dan telah ditolak, oleh itu rayuan ini. B C D

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Tiada perenggan di dalam afidavit sokongan perayu menyokong hujahan bahawa alasan telah diberikan untuk kelewatan dalam menguatkuasakan penghakiman. Mereka hanya menetapkan kronologi peristiwa, dan tidak lebih daripada itu. Oleh kerana perayu tidak memberi alasan sama sekali untuk menjelaskan kegagalan untuk melaksanakan penghakiman dalam tempoh enam tahun, tidak ada asas bagi timbalan pendaftar yang bijaksana untuk menjalankan budi bicaranya memihak kepada pemberian kebenaran menurut A 46 k 2(1)(a) Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 14–15). E F

(2) Ini adalah situasi di mana perayu duduk di atas haknya untuk menguatkuasakan penghakiman persetujuan yang diperolehi. Keseluruhan idea di sebalik A 46 k 2(1)(a) Kaedah-Kaedah Mahkamah 2012 adalah untuk pelaksanaan penghakiman itu selesai sepenuhnya dalam tempoh enam tahun melainkan jika pihak yang telah memperoleh penghakiman memberikan sebab yang sah untuk tidak berbuat demikian dalam tempoh itu. Keputusan di *RHB Bank Bhd v Raja Alawiah bt Raja Lop Idris* [2017] MLJU 1816 mesti difahami dalam konteks fakta dan keadaannya tersendiri yang berbeza dengan fakta dan keadaan kes ini (lihat perenggan 16–17 & 22).] G H

Cases referred to I

Affin Bank Bhd v Wan Abdul Rahman bin Wan Ibrahim [2003] 2 MLJ 509, CA (refd)

Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1, FC (refd)

A *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223, CA (refd)
Low Cheng Soon v TA Securities Sdn Bhd [2003] 1 MLJ 389, CA (refd)
RHB Bank Bhd v Raja Alawiah bt Raja Lop Idris [2017] MLJU 1816, CA (distd)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228, PC (refd)
B *Reed (a debtor), Re* [1979] 2 All ER 22, Ch D (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150; [1981] CLJ 84; [1981] CLJ Rep 101, FC (refd)

Legislation referred to

C Limitation Act 1953 s 6(3)
Rules of Court 2012 O 46 rr 2(1)(a), 3

Appeal from: Civil Suit Nos D4–22–1027 of 2002 and D8–22–260 of 2003 (High Court, Kuala Lumpur)
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Raiza bt Zakaria (Albar & Partners) for the appellant.
Dhiya Damia Shukri (Amir Arif Azmi with her) (Saranjit Singh) for the respondents.

E **Abdul Rahman Sebli JCA (delivering judgment of the court):**

[1] The single issue that called for our determination was whether the learned High Court judge was correct in affirming the learned deputy registrar's decision to set aside the ex parte order granting the appellant leave under O 46 r 2(1)(a) of the Rules of Court 2012 ('the Rules') to enforce judgment six years after it was obtained.
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[2] It was an appeal against an exercise of discretion by the learned deputy registrar as affirmed by the learned High Court judge. The principle is that an appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong, but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's discretion on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion: see the Federal Court case of *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150; [1981] CLJ 84; [1981] CLJ Rep 101 (FC).
G H

[3] In that case, Eusofee Abdoolcader J (as he then was) delivering the judgment of the Federal Court quoted with approval the following expression by Goulding J in *Re Reed (a debtor)* [1979] 2 All ER 22 at p 25:
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> ... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we

> may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.

[4] Having heard arguments by both sides, we were not persuaded that the discretion had been exercised wrongly or that it had occasioned a miscarriage of justice to warrant appellate interference. Accordingly we dismissed the appeal by a unanimous decision. These are the grounds of our decision.

[5] Order 46 r 2(1)(a) of the Rules reads as follows:

> A writ of execution to enforce a judgment or order may not be issued without the leave of the Court in the following cases:
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> (a) Where six years or more have lapsed since the date of the judgment or order.

[6] Order 46 r 3 further stipulates that the application for leave may be made ex parte but must be supported by an affidavit, setting out therein, inter alia, the reasons for the failure to enforce the judgment or order within the six year period limited by O 46 r 2(1)(a). The need to give reason(s) is therefore a mandatory requirement.

[7] This court in *Affin Bank Bhd v Wan Abdul Rahman bin Wan Ibrahim* [2003] 2 MLJ 509 held that when applying for leave, it is incumbent on an applicant to support its application by giving reasons for the delay. Absent reason(s) for the delay, leave would be refused. This is what Arifin Zakaria JCA (as he then was) said in delivering the judgment of the court:

> It is trite that the grant for leave under O 46 r 2 is in the court's discretion. Order 46 r 3 states that an application under O 46 r 2(1) must be supported by an affidavit stating the reasons for the delay in enforcing the judgment or order. Therefore, it is incumbent upon the applicant to furnish the court with sufficient reason in support of such an application. What is sufficient reason? This naturally will vary from case to case.

[8] In another decision of this court, viz *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389, Alauddin JCA (as he then was) delivering the judgment of the court said at p 394:

> There is no doubt in our minds and we agree with learned counsel for the respondent that this rule is mandatory. There are abundant authorities decided in our courts to suggest that the word 'shall' when used in any legislation means 'obligatory'. However, we do not propose to cite these authorities. Suffice it for us to

say that the word 'shall' used in r 18(4)(c) of the Rules reflects a measure of mandatoriness in it. As this is a mandatory rule, it must therefore be strictly adhered to.

[9] The chronology of events leading to the filing of this appeal is as follows:

26 October 2009	—	Consent judgment was recorded in favour of the appellant bank against the respondents.
2 August 2012	—	On bankruptcy proceedings initiated by the appellant, receiving order and adjudicating order ('the ROAO') were made against the second respondent.
25 February 2013	—	The second respondent filed an application to set aside the ROAO.
6 November 2013	—	The second respondent procured an order to set aside the ROAO.
13 September 2012	—	In the meantime, action was taken by the appellant in the form of sale of charged assets charged in its favour resulting in the recovery of a sum of RM5,928,638.40.
17 December 2012	—	Action was taken by the appellant in the form of sale of charged assets in its favour resulting in the recovery of a sum of RM378,678.03.
6 June 2017	—	Ex parte application by the appellant for leave to enforce the judgment.
31 July 2017	—	Leave to enforce judgment after six years was granted.
29 September 2017	—	Application by the respondent seeking an order to set aside the ex parte order.
15 November 2017	—	The ex parte order for leave to enforce the judgment after six years was ordered to be set aside by the Deputy Registrar of the High Court.
23 November 2017	—	The appellant (plaintiff in the High Court) appealed to the judge in chambers against the order of the deputy registrar setting aside the ex parte order and was dismissed, hence the present appeal.

[10] The judgment sought to be enforced by the appellant is dated 26 October 2009. Therefore the six year period limited by O 46 r 2(1)(a) for the appellant to complete execution of the judgment ended on 26 October 2015. By filing the ex parte application for leave on 6 June 2017, the appellant was late by approximately one year and four months (measured from 26 October 2015).

[11] By the terms of O 46 r 2(1)(a), delay can be countenanced by the court provided the appellant could offer valid and sufficient reason(s) for the delay. In *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 Lord Guest delivering the judgment of the Judicial Committee of the Privy Council made the following observations:

> The Rules of Court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

[12] In *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 this court through Gopal Sri Ram JCA (as he then was) said at p 229:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.
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> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the primarily vests the discretion.

[13] Learned counsel for the appellant drew our attention to paras 5–9 of the affidavit in support of Ahmad Kamal bin Kadir, the Vice-President of the Corporate and Commercial Recovery Department of the appellant. The suggestion was that these paragraphs provide tenable reasons for the delay in enforcing the judgment. We reproduce below these paragraphs, if only to see if what learned counsel said is true:

> 5. Untuk makluman Mahkamah yang Mulia ini, pada 26.10.2009 Plaintif telah memperolehi satu Penghakiman Persetujuan (selepas ini dirujuk sebagai *'Penghakiman tersebut'*) terhadap pihak-pihak berikut:
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> (i) Teratai Sanjung (M) Sdn Bhd (iaitu Plaintif dalam Guaman No D4-22-1027-2002 dan Defendan Pertama dalam Guaman No D8-22-260-2003) (selepas ini dirujuk sebagai *'Defendan Pertama'*); dan
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> (ii) Rosli Bin Hashim (iaitu Defendan Ke-2 dalam Guaman No D8-22-260-2003) (selepas ini dirujuk sebagai *'Defendan Ke-2'*).
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> Sesalinan penghakiman bertarikh 26.10.2009 dilampirkan di sini dan ditandakan sebagai ekshibit *'AKK-1'*.
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> 6. Saya telah dinasihatkan oleh peguamcara bagi pihak Plaintif bahawa selepas

Penghakiman tersebut diperolehi terhadap Defendan Pertama dan Defendan Ke-2 pada 26.10.2009, peguamcara Plaintif telah memfailkan Notis Kebankrapan terhadap Defendan Ke-2 melalui No. Kebangkrapan 29-1785-2010 di Mahkamah Tinggi Kuala Lumpur dam memperolehi Perintah Penghukuman dan Perintah Penerimaan terhadap Defendan Ke-2 pada 2.8.2012 (selepas ini dirujuk sebagai *'Perintah Penghukuman dan Perintah Penerimaan tersebut'*).

Sesalinan Perintah Penghukuman dan Perintah Penerimaan bertarikh 2.8.2012 dilampirkan di sini dan ditandakan sebagai ekshibit *'AKK-2'*.

7. Walaubagaimanapun, pada 25.2.2013 Defendan Ke-2 telah memfailkan satu permohonan untuk mengetepikan Perintah Penghukuman dan Perintah Penerimaan tersebut.

8. Setelah peguamcara Defendan Ke-2 dan peguamcara pihak plaintif memfailkan Afidavit-Afidavit Balasan serta Hujahan-Hujahan masing-masing serta menghadiri pendengaran-pendengaran permohonan Defendan Ke-2, mahkamah yang mulia ini telah memerintahkan bahawa Perintah Penghukuman dan Perintah Penerimaan bertarikh 2.8.2012 terhadap Defendan Ke-2, Notis Kebankrapan bertarikh 11.5.2010 dan Petisyen Pemiutang bertarikh 21.12.2011 diketepikan.

Dilampirkan di sini Perintah bertarikh 6.11.2013 dan ditandakan sebagai Eksibit *'AKK-3'*.

9. Sementara itu, Plaintif telah bertindak melupuskan asset-aset yang dicagarkan kepada Plaintif untuk jumlah RM5,928,638.40 pada 13.9.2012 dan jumlah RM378,678.03 pada 17.12.2012.

[14] With due respect to learned counsel, none of these paragraphs, taken individually or collectively, supports her argument that tenable reasons had been provided for the delay in enforcing the judgment. They merely set out the chronology of events, and nothing more than that.

[15] Since the appellant provided no reason at all to explain the failure to execute the judgment within six years, there was no basis for the learned deputy registrar to exercise his discretion in favour of granting leave pursuant to O 46 r 2(1)(a) of the Rules. The appeal ought to be dismissed on this ground alone.

[16] The appellant's next line of argument was that this is not a situation where the appellant sat on its right to execute after the consent judgment was obtained. It was pointed out that the appellant had initiated bankruptcy proceedings against the second respondent and foreclosure proceedings against the first respondent and therefore the learned judge erred in failing to take these factors into account in affirming the decision of the learned deputy registrar to set aside the ex parte order for leave.

[17] With due respect, we were unable to agree. The whole idea behind O 46 r 2(1)(a) of the Rules is for execution of the judgment to be fully completed

within six years unless the party who had obtained judgment provides valid reason(s) for not doing so within that period. It will defeat the legislative intent behind the provision if we were to accede to learned counsel's proposition.

[18] The appellant further argued that it was entitled to bring any action before the expiry of 12 years as provided by s 6(3) of the Limitation Act 1953. It was pointed out that when the consent judgment was obtained on 26 October 2009, there was no legal requirement for the appellant to obtain leave prior to execution of the judgment and that the legal position had only changed on 6 April 2015 when the judgment had almost reached the sixth year.

[19] It was argued that in the circumstances it would be unreasonable to penalise the appellant for the change in the law at the expense of the appellant's right to recover the debt pursuant to the consent judgment, which amounted to RM8,692,683.57. We were referred, inter alia, to the following paragraphs in the judgment of this court in *RHB Bank Bhd v Raja Alawiah bt Raja Lop Idris* [2017] MLJU 1816:

> [33] We are of the view that the learned HCJ erred by not considering the appellant's peculiar position, namely that prior to 6 April 2015, before the decision in *Dr Shamsul Bahar* was pronounced by the Federal Court, at all times within 12 years allowed for execution of a judgment pursuant to s 6(3) of the Limitation Act 1953, and even after the six years for execution of a writ of execution under O 46 r 2(a) of the ROC, the appellant was not required by law to apply for leave of the court to commence bankruptcy proceedings against the respondent based on the amended judgment dated 17 June 2003.
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> [34] However, with the change in law brought about by the decision in *Dr Shamsul Bahar*, in abundance of caution, the appellant filed its leave application on 18 May 2015 for leave as provided in O 46 r 2(a) of the ROC before commencing bankruptcy proceedings against the respondent.
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> [35] The learned HCJ had therefore erred in fact and in law in not accepting the reasonable explanation given by the appellant for the delay in filing the leave application before commencing bankruptcy proceedings. This is despite the fact that the limitation period of 12 years for execution of the amended judgment dated 17 June 2003 has not set in to bar the appellant from executing the same. The learned HCJ should have given due consideration to this fact.
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> [36] We are of the view that the appellant's leave application was made within the limitation period of 12 years. Furthermore, decided authorities cited by learned counsel for the appellant show that a change of law is good reason to justify the court to exercise its discretion to grant the leave application. However, the learned HCJ failed to exercise her discretion judiciously.

[20] First of all we could not see the relevance of the case as the appellant in that case provided reasons for the delay whereas the appellant in the present case did not.

[21] Secondly, the case of *Dr Shamsul Bahar* referred to by the court concerns the question whether, before the issuance of a bankruptcy notice on a judgment of more than six years, a judgment creditor is to obtain leave of the court. It was decided that although bankruptcy proceedings are not execution, the right to issue a bankruptcy notice is pegged to a judgment creditor's right to issue execution on the judgment, which necessitated the prior leave of the court.

[22] Thirdly, this court did not say that in an application for leave under O 46 r 2(1)(a) of the Rules, the reason(s) for the delay need not be given. The decision in *Raja Alawiah bt Raja Lop Idris* must therefore be understood in the context of its own peculiar facts and circumstances, which are materially different from the facts and circumstances of the case before us.

[23] It was for all the reasons aforesaid that we dismissed the appeal with costs of RM5,000 and affirmed the decision of the High Court.

Appeal dismissed and decision of High Court affirmed.

Reported by Ahmad Ismail Illman Mohd Razali